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IN THE

Supreme Court of the United States

October Term, 1962
No. 240

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California corporation; EASON MONROE,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

Petition for Writ of Certiorari to the Supreme Court of the State of California.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA 6-9171.

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vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioners, American Civil Liberties Union of Southern California and its Executive Director, Eason Monroe, respectfully pray for a Writ of Certiorari to the Supreme Court of the State of California in order to review its judgment denying a writ of mandate directing respondent, the Board of Education of the City of Los Angeles, to act upon petitioners' applications for leave to hold public meetings, without requiring petitioners to subscribe to an oath required by respondent's Rule 1316, in a public building which has been dedicated as a civic center where citizens and organizations may meet and discuss public questions.

Opinion Below.

The opinion of the court below[1] is reported at 59 A. C. 215, 28 Cal. Rptr. 700, 379 P. 2d 4, and a copy is annexed hereto as Appendix "A."

The judgment of the court below, in accordance with that court's practice, is the final paragraph of its opinion (Appx. A, 24) which reads, "Rule 1310 of the respondent board is not invalid for any of the reasons suggested by petitioners. The alternative writ of mandate heretofore issued should be discharged and a peremptory writ denied. It is so ordered."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is February 26, 1963 (Opinion; Appx. A 1);

2. No petition for rehearing was filed. Mr. Justice Douglas granted an extension of time within which to petition for certiorari to and including June 26, 1963;

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[1] The record as certified to this court by the clerk of the court below is not bound nor consecutively paged. It consists of the following documents which, when referred to in this petition, will be referred to as such: petition for writ of mandate and points and authorities, points and authorities in opposition to the granting of a writ of mandate, petitioners' reply to respondents' points and authorities in opposition to granting a writ of mandate, alternative writ of mandate, respondent's return to alternative writ of mandate by way of demurrer and points and authorities, reply to respondents' points and authorities on returns to alternative writs of mandate, application by petitioners for leave to file post oral argument memorandum and memorandum, opinion of the California Supreme Court.

3. The statutory provisions believed to confer on this court jurisdiction to review the judgment in question are 28 U. S. C. 1257(3) and 2101(c).

Questions Presented for Review.

Is Rule 1316 of the Los Angeles Board of Education which denies the right to hold a public meeting in a civic center auditorium unless the applicant sign an oath reading:

> "The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime including, but not limited to, the crime specified in Sections 11400 and 11401 of the California Penal Code. I certify (or declare) under penalty of perjury that the foregoing is true and correct."

unconstitutional on its face or as applied because

a. it abridges freedom of speech or assembly in violation of the First and Fourteenth Amendments to the Constitution, or because

b. it deprives petitioners of procedural due process of law as guaranteed by the Fourteenth Amendment to the Constitution, or because

c. it offends due process under the Fourteenth Amendment by reason of being arbitrary and unreasonable, vague, indefinite and uncertain, or because

d. it subverts the presumption of innocence?

Constitutional Provisions and Statutes Which the Case Involves.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exertise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 1316 of the Los Angeles Board of Education provides:

> "1316. Statement of Information. Each person or group requesting the use of the premises for a Civic Center Activity shall, as a condition for the issuance of the permit, file the following statement:
>
> "'The undersigned states that, to the best of his knowledge, the school property for the use of which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime including, but not limited to, the crime specified in

Sections 11400 to 11401 of the California Penal Code. I certify (or declare) under penalty of perjury that the foregoing is true and correct."

Statement of the Case.

Facts.

The facts are not in dispute, the allegations in the petition for writ of mandate being admitted by respondent's demurrer (Demurrer: 1).

Petitioners are an organization dedicated to the protection and defense of the rights and liberties set forth in the Bill of Rights to the United States Constitution, and the organization's Executive Director (Petition 1). Respondent has jurisdiction over the use of premises for public meetings under the California Civic Center Act of the John Burroughs Junior High School (*ibid.* 2).[2] Petitioners requested of respondent the use of the auditorium or a large classroom for a series of meetings, at which the individual petitioner would preside, on the subject "The Bill of Rights" (*ibid.* 2).

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[2]The fact that a school auditorium is the place where petitioners seek to hold their meetings is of no significance in this case. No educational problems are involved. By the California Civic Center Act (Calif. Ed. Code Sec. 10551-10566), school auditoriums have been dedicated as "civic centers . . . where the citizens" and organizations "may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside." (Calif. Ed. Code Sec. 10556.) For the purposes of the issues involved here, the case is the same as though the meetings were sought to be held in a public park (*cf., Niemotko v. Maryland*, 340 U. S. 268) or on a public street (*cf., Kunz v. New York*, 340 U. S. 290). Under the section last quoted from, "The connections and affiliations of one who requests the use of a school building as a forum are of no more concern to the school administrators than to a superintendent of parks or streets if the forum is the green or the market place." (*Donskin v. San Diego Unified School District*, 28 Cal. 2d 536, 547, 171 P. 2d 885.)

As a matter of principle and because they believe the requirement of respondent's Rule 1316 is unconstitutional, petitioners refused to sign the "Statement of Information" required by the Rule, set out hereinabove at pages 4-5 (*ibid.* 3). Solely because petitioners would not sign the statement, respondent denied petitioners the right to hold the meetings (*ibid.* 3-4).

How the Federal Questions Were Raised and the Rulings Thereon.

The Petition for Writ of Mandate was an original petition filed in the court below and the federal questions were raised by allegation in the petition, as follows:

> "Respondent's Rule 1316, both on its face and as applied, as a condition to the use of school facilities for a public meeting, is unconstitutional and void because it abridges freedom of speech and freedom of assembly in violation of . . . Amendments 1 and 14 of the Constitution of the United States; additionally, it deprives the petitioners of procedural due process of law, as guaranteed by . . . Amendment 14 to the Constitution of the United States, because it deprives the petitioners of freedom of speech and of assembly, without the procedural safeguards required by said due process provisions. Also, it offends due process and free speech because it is arbitrary and unreasonable, vague, indefinite and uncertain and because it subverts the presumption of innocence. . . ."

As to these contentions, the court below ruled (Appx. A, 24): "Rule 1316 of the respondent board is not invalid for any of the reasons suggested by petitioners."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Important Questions Concerning the Rights of Free Speech and Assembly and Due Process of Law Not Heretofore Passed Upon by This Court Have Been Decided by the Court Below in a Way Probably Not in Accordance With Previous Decisions of This Court.

A. This Is a Test Oath Case.

Members of this Court have recognized the evils resulting from "the endless proliferation of 'loyalty' oaths." *(Speiser v. Randall*, 357 U. S. 513, 532, concurring opinion.) And the Court itself has stated, "The test oath is abhorrent to our traditions." *(Girouard v. United States*, 328 U. S. 61, 69.) Traditionally the Oath has been used against the innocent and the conscientious *(Re Summers*, 325 U. S. 561, 576, dissenting opinion; *Speiser v. Randall*, 357 U. S. 513, 531, concurring opinion; *American Communications Association v. Douds*, 339 U. S. 382, 447, dissenting opinion; statement of then Senator J. F. Kennedy, Hearings before the Subcommittee on Education on Labor and Public Welfare, U. S. Senate, 86 Cong., 1st Sess. on S. 819, pg. 3; statement of the late A. Whitney Griswold, *ibid.*, pg. 8) and as a tool to suppress and curtail the exercise of legitimate legal rights (see, *e.g.* "Test Oaths, Henry VIII to the American Bar Association," 11 Lawyers Guild Review 111). Our history suggests that this was to be a government "'securely beyond the reach of oaths.'" *(Torcaso v. Watkins*, 367 U. S. 488, 491.)

In the case at bar, though more cleverly phrased, perhaps, "An old pattern in new guise is revealed by the record." *(Terry v. Adams*, 345 U. S. 461, 480.) Thus, here, the applicant who wants to hold a public meeting must make oath that he will not commit "the crime specified in Sections 11400 and 11401 of the California Penal Code." These sections are the old California Criminal Syndicalism Law. Criminal Syndicalism is defined (Section 11400) as "any doctrine or precept *advocating*, teaching or aiding and abetting the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." And Section 11401 makes it a felony to advocate criminal syndicalism including, "by spoken or written words (to) justif(y) or attempt . . . to justify criminal syndicalism . . . with intent to approve, advocate or further the doctrine of criminal syndicalism." Accordingly, the oath at bar is aimed at political advocacy.

The California Criminal Syndicalism Act is much broader than the Smith Act which, even so, was narrowly construed by this Court in *Dennis v. United States*, 341 U. S. 494 and *Yates v. United States*, 354 U. S. 298; it is broader than the Taft-Hartley Act Oath considered by this Court in *American Communications Association v. Douds*, 339 U. S. 382; and it is much broader than the oath invalidated by this Court in *Speiser v. Randall*, 357 U. S. 513. Whereas the oath struck down by this Court in *Speiser* was limited and narrowly construed by the California Court to come

within the standards set down by this Court in *Dennis*; the court below in the instant case did no such thing. On the contrary, it appears to have given the regulation a broad interpretation by citing (Appx, A. 21) so criticized a case as *In re Wood*, 194 Cal. 49, 227 Pac. 908 (see Chaffee, Freedom of Speech in the United States, 331).

The California Criminal Syndicalism Act was aimed at the International Workers of the World (*Whitney v. California*, 274 U. S. 357, 379, concurring opinion). Respondent here has resurrected an old, discredited California statute, unenforced for a quarter of a century, aimed at a group no longer active for over two decades, to justify an offensive intrusion into conscience.

The traditional test oath is at work here. This Court should grant a hearing to determine the validity of its modern manifestation.

B. The Restriction by Respondent's Oath on Free Speech Is Not Justified Under Constitutional Standards.

There is no clear and present danger in this ... which sanctions respondent's oath. In *National Association for the Advancement of Colored People v. Alabama*, 371 U. S. 415, 438 this Court said, "only a compelling state interest in the regulation of a subject within constitutional power can justify limiting First Amendment freedoms." This doctrine was reiterated on the last day of court last term in *Sherbert v. Verner*, ... U. S. ..., 31 USLW 4719, 4721.

Neither respondent, nor its counsel, nor the court below made any findings nor even any claim, and certainly no showing, that there was any, or a danger of

any, advocacy of Criminal Syndicalism at all, much less in a public meeting held in a civic center dedicated to free speech. Nor was there any finding, claim or showing, to justify the oath, that the all inclusive, "any act which is prohibited by law or . . . any crime" was occurring at such public meetings.

The instant case comes well within the doctrine (*Gibson v. Florida Investigative Committee*, 372 U. S. 539, 546; *Bates v. Little Rock*, 361 U. S. 516, 524) that "where there is a significant incroachment upon personal liberty, the State may prevail *only upon showing* a subordinating interest *which is compelling* (italics added)." None such was made here. Moreover, "only considerations of the greatest urgency can justify restrictions on speech." (*Speiser v. Randall*, 357 U. S. 513, 521). No such considerations have been shown nor even suggested here; "the state has failed to advance any substantial regulatory interest, in the form of *substantial evils flowing from petitioners' activities*, which can justify the (oath) which it has imposed." (paraphrased from *N.A.A.C.P. v. Button*, 371 U. S. 415, 444; italics added).

Both the California Legislature (California Assembly Weekly History, May 15, 1961, p. 351) and the California Voters (Statement of Vote for November 6, 1962 General Election compiled by the California Secretary of State, page 35, announcing that Proposition 24 had been defeated) rejected the very oath adopted by respondent and at issue here. While the oath at stake is now in use just by respondent, its approval, should this Court deny a hearing, can only lead, in these times, to other governmental units throughout the land adopting a like restriction; "there

are village tyrants as well as village Hampdens." (*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 638). Since, as we have pointed out above (f.n. 2), the right to hold a meeting in an auditorium is the same as in a public park, if the oath here is sustained, by the denial of certiorari, it would mean that other governmental agencies could require the same oath for use of other public facilities, for example, a park itself, a swimming pool, a playground, a golf course. And all, without the showing of any need therefor.

Hearing should be granted.

C. The Oath Is Unconstitutionally Vague.

Without dwelling on the obvious vagueness of an oath which requires one, under penalty of perjury, to swear that he will not commit any act which is prohibited by law, or any crime, or the vagueness of the Criminal Syndicalism Act itself,[3] the failing of the oath on the ground of vagueness is the more manifest here because free speech is involved. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 433).

Respondent's approach here is truly that of a shotgun. Compare Mr. Justice Harlan's concurring opin-

[3] *Cramp v. Board of Public Instruction*, 368 U. S. 278, 286-287, answers the argument that there is no vagueness because in the event of any criminal prosecution for perjury, the defenses of willfulness, knowledge and lack of intent would be available. Apropos the test oath quality discussed above, this Court in *Cramp* said (p. 285): "With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive."

ion in *Talley v. California*, 362 U. S. 60, 66-67: "In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality (prohibition, unless the author's name and address are shown) is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all embracing ordinance is likely to have."

It would be one thing if respondent barred an organization from meeting which had violated the Criminal Syndicalism Law or which, as a result of hearings, had been found to have committed crimes in public meetings in civic centers, or even elsewhere. But this is no such regulation. Instead, respondent's oath applies to all organizations and applicants. It applies to the "parent-teachers" associations, Campfire Girls, Boy Scout troops,[1] American Legion, everyone.

The oath is not narrowly drawn to meet a specific need in this sensitive area where sharpness, not bluntness, is required. "When the State undertakes to restrain unlawful advocacy, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights— . . . ." (*Speiser v. Randall*, 357 U. S. 513, 521). None such has been provided by respondent here. In *Sherbert v. Verner*, No. 526, O. T. 1962, June 17, 1963, 31 USLW 4719, 4721, this Court reiterated and made the more plain that where free speech is involved, unless it is clear that a more narrow provision would not meet the evil at which directed, the action is invalid. *If* there were

[1] These organizations are specifically named in the Civic Center Act (Calif. Ed. Code 16556).

a danger of crimes, unlawful acts or Criminal Syndicalism being committed at public meetings (and respondent has not shown this to be the case), then less restrictive measures, less compulsive on "those whose conscientious scruples were the most sensitive" (*Cramp, supra*, fn. 3), and directed against those who would so act, would meet that danger. The oath here falls wide of that mark.

D. The Oath Subverts the Presumption of Innocence and Inverts the Burden of Proof.

In order to hold a public meeting, the applicant must swear that he will not commit a crime, including the crime of illegal advocacy.

Such an oath, we submit, presumes that the applicant is guilty, or will be, and casts upon him the burden of proving otherwise. It is a procedure that evinces "a spirit of general suspicion and distrust" which should not be allowed at least "until we have tangible ground for misgiving" (Judge Learned Hand, quoted in Hearings before the Subcommittee on Education of the Committee on Labor and Public Welfare, U. S. Senate, 80th Cong., 1st Sess., on S. 819, p. 5).

As in *Cummings v. Missouri*, 4 Wall (U. S.) 277, 18 L. Ed. 356, 364, the Oath here "assume(s) that the parties are guilty; (it) call(s) upon the parties to establish their innocence; and (it) declare(s) that such innocence can be shown only in one way—by an inquisition in the form of an expurgatory oath, into the consciences of the parties." "This," in the language of Alexander Hamilton (18 L. Ed. at 365), "was to invert the order of things; and instead of obliging the State to prove the guilt, in order to inflict the

penalty, it was to oblige the citizen to establish his own innocence in order to avoid the penalty." See also, *The Matter of Dorsey*, 7 Port. (Ala.) 293, 354-369, 369-387 (1938).

Respondent's oath declares every applicant who wants to hold a public meeting presumptively guilty of crime. "It is not within the province of a legislature" so to do (*Speiser v. Randall*, 357 U. S. 513, 523-524).

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted.

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioners.

APPENDIX A.

[L. A. No. 26948. In Bank. Feb. 26, 1963.]

American Civil Liberties Union of Southern California et al., Petitioners, v. Board of Education of the City of Los Angeles, Respondent.

A. L. Wirin and Fred Okrand for Petitioners.

Harold W. Kennedy, County Counsel and Ronald L. Schneider, Deputy County Counsel, for Respondent.

PETERS, *J.*—Petitioners, a nonprofit corporation and its Executive Director, seek mandate to compel the respondent Board of Educaiton to grant its application for a permit to use John Burroughs Junior High School Auditorium for a series of public bimonthly meetings on the subject of "The Bill of Rights." Respondent denied that application upon the sole ground that petitioners refused to file a statement of information as required by respondent's rule 1316.[1] The sole question presented by this proceeding is whether respondent has the legal right to make compliance with that rule a prerequisite to an otherwise lawful use of the school premises.

The use for which the school premises is requested is admittedly a proper use within the Civic Center

[1]Rule 1316 of the Los Angeles Board reads as follows:

"1316. Statement of Information. Each person or group requesting the use of the premises for a Civic Center Activity shall, as a condition for the issuance of the permit, file the following statement:

"'The undersigned states that to the best of his knowledge, the school property for the use of which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime including, but not limited to, the crime specified in Sections 11400 to 11401 of the California Penal Code. I certify (or declare) under penalty of perjury that the foregoing is true and correct.'"

Act (ch. 4, div. 12, Ed. Code), which makes school property available for any public use which does not interfere with the school program. Petitioners' request does not entail any such interference. Petitioners' refusal to comply with respondent's rule 1316 was based solely on principle, in that they believe the requirements thereof are unconstitutional. The parties hereto are the same as the parties in *American Civil Liberties Union v. Board of Education*, 55 Cal.2d 167 [10 Cal. Rptr. 647, 359 P.2d 45], filed January 24, 1961, in which this court reiterated the principle (previously stated in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal.2d 536, 545-546 [171 P.2d 885]) that while "[t]he state is under no duty to make school buildings available for public meetings . . . . [i]f it elects to do so . . . it cannot arbitrarily prevent any member of the public from holding such meetings . . . [n]or . . . make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights." In that decision we also held that sections 16564 and 16565 of the Education Code (a portion of the Civic Center Act) were unconstitutional insofar as they required an applicant for use of school property to file a statement that the property would not be used "to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence or other unlawful means," and that the organization applying does not

advocate such and is not a communist-action or communist-front organization.[2] The tenor of that opinion was that the statutory requirement was aimed not at the use to which the school property would be put, but was intended to bar certain organizations from use because of their political beliefs; in other words, that the statute ignored the fact that such an organization might desire to use the school property for perfectly legitimate purposes.

When that decision became final, the respondent board investigated the necessity and propriety of filling (by local rule) the gap left by this court's holding that section 10505 was unconstitutional. It noted that other sections of the Civic Center Act, which remained in effect, required it to take such steps as might be required to prevent improper use of school property, while still other sections granted it the power to make local rules and regulations for such purpose. It considered several proposed regulations, and finally adopted the rule here under scrutiny.

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[2]The Statement of Information required by section 10505 reads as follows:

"The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence or other unlawful means;

"That ..... the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California by force, violence, or other unlawful means, and that, to the best of his knowledge, it is not a communist action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury."

Thus the basic question is whether respondent's rule 1316 is in conflict with any provision of the state or federal Constitutions. The respective contentions of the parties in this regard are as follows:

1. Petitioners urge and respondent denies that the statement of information required by rule 1316 is an unconstitutional abridgement of petitioners' rights of free speech, and assembly for the same reasons that this court held that the provisions of Education Code section 16565 are invalid.:

2. Petitioners urge and respondent denies that such requirement subverts the presumption of innocence and inverts the burden of proof;

3. Petitioners urge and respondent denies that rule 1316 violates due process of law because it is too broad, and is arbitrary, unreasonable, and vague;

4. Petitioners urge and respondent denies that respondent was without power to enact rule 1316 because of state pre-emption of the field.

We find no merit in petitioners' contentions.

Respondent's rule 1316 does not establish an unconstitutional abridgement of the rights of free speech and assembly:

Since petitioners in this portion of their argument rely principally upon our previous decision in *American Civil Liberties Union v. Board of Education, supra,* 55 Cal.2d 167, the basic distinction between the statute there involved and rule 1316 should be noted. Section 16565 of the Education Code provided that an applicant could be denied the use of school property solely because of that applicant's political beliefs, and not be-

cause of the use to which it intended to put the premises. Respondent's rule 1316, on the other hand, requires no information regarding the applicant itself, but is restricted to a negative statement of the purpose for which it intends to use the building—that is, a statement that the property will not knowingly be used for the commission of any illegal act. The Education Code section was directed exclusively to communist activities, or activities ordinarily associated with communist organizations, whereas respondent's rule refers in general to "any act which is prohibited by law."[3] These distinctions not only provide the basis for determining that the latter does not abridge the rights of free speech and assembly, but are also germane to the other legal issues here presented. Thus, the claim that the rule subverts our former opinion is unsound.

In an attempt to sustain the claim that the requirements of the rule violate the constitutional guarantees of freedom of speech and assembly, petitioners next claim that the statement which an applicant must submit constitutes prior censorship and a prior restraint on free speech, and that such is not justified by any clear and present danger. In a very limited sense the requirement that one state in advance that he will not knowingly commit an illegal act constitutes a prior restraint, but it is not censorship (unless self-censorship be included in the definition). The kind of censorship usually attacked is where the statute requires

[3] It is true that in addition to this general phrase, the rule requires a specific statement that the school premises will not be used for the acts denounced by sections 11400 and 11401 of the Penal Code. The effect of such additional language is discussed below.

that spoken or written words, picture or performance, be submitted, before publication, to an authority which then makes a determination of whether the words or performance may be made public. Here there is no such requirement. The matter to be presented to the public is not disclosed in advance, and no authority is given the board to predetermine whether that matter is or is not to be presented. The rule under discussion requires only that the applicant censor itself; that is, that it submit in advance a statement that it does not knowingly intend to commit any criminal act on the school property. Therefore, the requirement of respondent's rule cannot be deemed to be the type of prior restraint ordinarily referred to as an unconstitutional limitation upon freedom of speech or assembly.

Moreover, not all prior restraints are, ipso facto, unconstitutional. In *Times Film Corp. v. Chicago*, 365 U.S. 43 [81 S.Ct. 391, 5 L.Ed. 2d 403], the United States Supreme Court recently held that a Chicago ordinance requiring an exhibitor to submit all motion picture films to a governmental censor before receiving a permit for public display was a valid prior restraint which did not violate the constitutional guarantee of free speech. There, commencing at page 47, the court said: "It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near v. Minnesota*, (1931) 283 U.S. 697, 715-716 [51 S.Ct. 625, 75 L.Ed. 1357]. Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed, that the principle forbidding previous restraint 'is stated too

broadly, if every such restraint is deemed to be prohibited. . . . [T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. These included, the Chief Justice found, utterances creating 'a hindrance to the Government's war effort, and 'actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.' In addition, the Court said that 'the primary requirements of decency may be enforced against obscene publications' and the 'security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.'" On page 49, the court added, "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. . . .

"Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute . . . and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment—a claim without sanction in our cases."[1]

Thus, where the subject matter of the intended speech or assembly is such that it may properly be prohibited by law, and where there is an intention to assemble or

[1]Petitioners here also make the claim that the sole remedy against seditious use of the school property is to be found in the criminal statutes which may be resorted to after the fact. That contention appears to be disposed of by the United States Supreme Court.

speak under such circumstances as requires prior governmental license, the conditioning of such license upon a restraint against violating the law is not such prior restraint as is repugnant to the constitutional guarantees.[5]

There is a great difference between the exercise of those fundamental rights which do not require prior permit and those which, while they may not be denied arbitrarily, require permit or licensing by a public authority. It undoubtedly would be improper to refuse a permit to hold a parade in the public streets merely because the permitting authority is not in sympathy with the cause which applicant espouses. But it would be entirely reasonable to demand that such applicant agree, *in advance*, to comply with existing municipal ordinances, including (but not confined to) use of the streets during hours of heavy traffic, blockage of intersections beyond a specified time limit, inciting of riot, bearing loaded weapons, setting off of fireworks, etc. The licensing authority has both the right and the duty to place such reasonable restrictions on the freedom of assembly. Such restrictions or limitations would create no less a prior restraint than is to be found in respondent's rule 1316; and it would be neither more nor less of a restraint by reason of grouping all

[5]So stated, a rule authorizing prior restraint is not repugnant to the views of the dissenting minority in the *Times Film* case. Led by the Chief Justice, the minority were of the view that the majority opinion would result in unbridled censorship, which could destroy freedom of expression without the safeguards afforded by subsequent trial for illegal abuse of that freedom. The minority objected only to that form of censorship, and not to prior restraint, as such. Respondent's rule herein does not provide any possibility of such censorship, and thus meets the test laid down by both the majority and the minority in the *Times Film* opinions.

such limitations into one demand that the licensee obey all civic ordinances.

In striking down the state statutes which the respondent's instant order replaces, this court pointed out (*American Civil Liberties Union v. Board of Education, supra*, 55 Cal.2d 167, at p. 178), the distinction between interfering with freedom of speech and thought for the direct purpose of prohibiting the same, and the tangential interference which results from another legitimate purpose. There we said (p. 179), that the Legislature had attempted to set up a system of prior restraint based upon who the individual applicant was. We left open the question of the legitimacy of the legislative purpose had the restraint been confined solely to the use to which the school was to be put. In the instant case, respondent has simply conditioned its consent upon a statement that the applicant does not intend to put the property to an illegal use. That it has both the right and duty to predetermine that school premises will not be used in contravention of the law is to be found both in its general power to hold, maintain and use property for educational purpose (see *Payroll Guar. Assn. v. Board of Education*, 27 Cal.2d 197 [163 P.2d 433, 161 A.L.R. 1300]), and in the specific provisions of the Civic Center Act (Ed. Code, §§ 10551-10560). It is there provided that the public use of school property is made dependent upon prior permission of the local board, and each board is empowered and enjoined to make such regulations as will insure the proper administration and use of its property within the framework of the act.[6] To

[6]A more detailed discussion of the respondent's power to legislate on the subject is included later in this opinion in the discussion of the issue of state preemption.

require an applicant to state that it does not knowingly intend to use the property in an illegal manner is a logical method of fulfilling that mandate. It follows that the prior restraint, if any, inherent in respondent's rule 1316 is not (in light of the *Times Film Corp.* decision) repugnant to any constitutional guarantee, and is not inimical to what we said in our opinion rendered in the previous action between these parties. For that reason it is unnecessary to discuss the question of clear and present danger, which the parties have argued at some length. It is also unnecessary to discuss other arguments made by the parties on the free speech issue. However, each of the parties has gone to such lengths in arguing the rules announced in *Barenblatt v. United States*, 360 U.S. 109 [79 S.Ct. 1081, 3 L.Ed.2d 1115], and *Konigsberg v. State Bar of California*, 366 U.S. 36 [81 S.Ct. 997, 6 L.Ed.2d 105] (and similar cases following the latter), that we should point out the inapplicability of those cases to the instant problem. There can be no doubt that those authorities hold that where the matter under consideration is one in which the public has a peculiar concern (such as the right to practice law) the governing body may have the right to inquire, in advance of granting licenses, into the qualifications (including the beliefs) of the individual seeking the license. Respondent contends that those cases are controlling here, and petitioners reply that permission to use a public building does not entail such public concern. These arguments are not here relevant for the reason that the rule here involved does not require the applicant to disclose either its qualifications, its beliefs, or its past activities.

Respondent's rule does not subvert the presumption of innocence, and does not invert the burden of proof:

Petitioners' argument in this regard is not entirely clear. It is not clear whether they claim that respondent is engaged in an unconstitutional attempt to require applicants to prove their fitness to use school property, or claim that the rule is invalid because it presupposes that applicants may be guilty of an intention to commit crimes. In either event, they argue that the constitutionality of rule 1316 must be tested by respondent's motives in adopting the measure. In an effort to justify the claim that the purpose of the legislation (as distinct from its effect) is unconstitutional, they call attention to what is obviously intemperate language appearing as arguments in favor of proposed repressive legislation (principally, the arguments prepared by the proponents of the so-called "Francis Amendment"—which was proposition 24 submitted to and defeated by the voters of the state at the general election on November 6, 1962—and contained in the pamphlet distributed to registered voters by the Secretary of the State). While such language may have disclosed the motivation of the proponents of that legislation, its appearance at or near the date on which respondent adopted rule 1316 does not connect it with respondent. It is irrelevant to the issue of respondent's motives in adopting its rule. More relevant are the minutes of the respondent board, contained in the record. Those minutes do show—and petitioners have made much of the fact—that some few of the members were anxious to institute a local rule which would have had the same purposes and effect as the statutes held to be unconstitutional by this court. But such

board members were in the minority, and the rule they proposed failed to pass. The arguments and the proceedings indicate that the majority of respondent board recognized the existence of a duty to make school property available to the public within the framework of the Civic Center Act, together with a duty to take such steps as might be necessary to insure proper use of the property. The local board has a clear duty in the latter respect. In proposing and securing adoption of rule 1316 the majority attempted to (and did) comply with those mandates. Whatever may have been the motives of the minority, they were unsuccessful, and respondent may not be judged by the actions or views of that minority.

The strongest evidence of the purpose of rule 1316 is to be found in the language used in the rule. Reduced to its essence, the single requirement of the rule is *that an applicant state that, to the best of his knowledge, the purpose for which it desires to use the school property is a legal one.* It seems clear that such a requirement is designed for the single purpose of determining in advance, so far as may be possible, that the school premises will not be used knowingly for illegal purposes.

Nor does rule 1316 subvert the presumption of innocence, or invert the burden of proof. As already pointed out, the rule does not require an applicant to divulge its political, sociological or economic beliefs. Neither does it require an applicant to set forth its general purposes, its associations, or anything about itself save and except the use to which if intends to put the school property—and even in that regard it makes no distinction between prospective uses so long

as they are within the law. Certainly if the rule required an applicant to state that it would refrain from using the school premises to display lewd or obscene pictures for the purpose of attracting the prurient and lascivious, it could not be attacked as shifting the burden of proof, or of subverting the presumption of innocence. Likewise, it could not be so attacked if it required a statement that the premises would not be used for the purposes of inciting riot, serving alcoholic beverages to minors, setting off dangerous fireworks, or for any other of a limitless number of possible activities which are concededly inimical to public health and safety. Since any such requirement is limited to a future use of the property (as distinct from an inquiry into applicant's past conduct) it is unrelated to the question of guilt or innocence. It might touch tangentially upon burden of proof, since it requires an applicant to furnish slight proof (consisting merely of its own statement) that it did not knowingly intend any of the enumerated illegal acts.[7] But it would be deemed an acceptable limitation on the proposed use of public property because it would constitute a legitimate and reasonable exercise of police power. If such seperate and piecemeal limitations upon illegal use of respondent's property be acceptable, there seems to be no reason why a single general limitation against all possible illegal use is not equally valid.[7] It would ob-

[7]Since we are here discussing only the claim that respondent's rule subverts the presumption of innocence, we leave for subsequent discussion the contention that such general limitation is unconstitutionally vague and broad. However, in order to forestall any claim that we have overlooked the possibility that the rule might have been framed to elicit a direct statement of an applicant's intended use, we here note that such would not necessarily fulfill respondent's legitimate purpose herein. A statement

viously be impracticable to expect respondent to set forth in its ordinance (or for applicant to be required to read and state that it would refrain from breach of) each specific illegal use that may exist. Therefore, the use of general phraseology seems preferable. In no other manner could the board obtain advance assurance from applicant that it intended to make a proper use of the property for which the board is responsible. The fact that an applicant is merely required to state that it does not knowingly intend to use the property for a future illegal use does not, of itself, constitute a presumption that applicant has done, or will do, anything wrong. It does not, therefore, subvert the presumption of innocence. If such statement be deemed to require the applicant to prove its fitness to use the property, we see nothing unconstitutional therein. Such is not a burden of proving innocence; it is a mere limitation on use. It is no more unwarranted than the burden created by the simple requirement that an applicant state the specific purpose for which it intends to use the property. Since petitioners' application as presented to respondent did contain the latter statement, we may assume that it concedes that respondent is entitled to know the use to which its property is to be put. And since a statement of a specific intended use does not negate other corollary uses, or illegal acts, we see no additional burden added by the simple requirement that applicant does not knowingly intend any illegal use.

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of the principal purpose for which the premises are to be used does not necessarily negative the possibility of corollary (and illegal) purposes. Only by requiring a general denial of intent to use the property for an illegal purpose can the respondent protect itself—and the property—against such contingency.

Nor can we find—as petitioners contend—any unconstitutional limitation in the fact that the rule requires an applicant to make the statement therein set forth under penalty of perjury. The oath is but the vehicle by which information (constitutional or unconstitutional) is sought. It is the right to demand the particular information that is at issue, and not the form in which it is requested. Frequently an applicant for governmental benefits is required to give information under oath. This is so because the verified information is more apt to be complete and correct. If the information sought by respondent is unassailable, then the form in which it is required is of no moment.

To this argument petitioners reply that the requirement (that the statement be made under penalty of perjury) implies an improper intent to place an applicant in a position where it may be prosecuted for perjury should the school premises be ultimately used for an illegal purpose. It must be remembered, however, that to secure a conviction for breach of the ordinance it would not be sufficient to show that applicant should have known that some law would be violated during the period applicant was in possession of the premises. The rule requires scienter as an indispensable element. It calls for the information "to the best of . . . . [applicant's] knowledge." To secure a conviction the prosecution would be required to prove that, at the time of signing and filing the statement, the applicant either knew that the school premises would be used, or intended to use them, for an illegal purpose. The requirement that an applicant make the preliminary denial of intent to commit crime upon the school property does not, in any real sense, require it

to prove its innocence in any criminal proceeding which may thereafter arise. In such a proceeding *scienter* would be the necessary element. (See *American Communications Assn. v. Douds*, 339 U.S. 382 [70 S.Ct. 674, 94 L.Ed. 925].)

Respondent's rule does not violate due process of law by reason of being too broad, vague, arbitrary or unreasonable:

Petitioners contend that insofar as rule 1310 requires an applicant to state that the school property "will not be used for the commission of any act that is prohibited by law," it fails to meet the standards of legislative clarity. They also argue that since the applicant is required to state that he will not use the premises for the commission of any crime, it follows that "acts prohibited by law" must refer to something other than crime. While the enactment may be redundant, it is not vague. Acts prohibited by law and acts which constitute the commission of a crime may be one and the same thing, but the meaning of each phrase is clear. Each of the two phrases simply requires an applicant to assure the governing board that the school property will not knowingly be used for *any* purpose which is prohibited by law. The authorities on which petitioners rely, for the purpose of demonstrating vagueness, relate to situations where the penal statute itself failed to set forth an ascertainable standard of guilt. But respondent's rule 1310 does not purport to be a penal statute, nor does it attempt to define a crime, or to make any act whatsoever punishable by law. It is simply the enactment of a rule under which the governing board, in order to meet the duties imposed upon it by statute, can determine in advance

that its property will be used in a lawful manner. By use of the challenged phrases it has simply incorporated the definitions of the various crimes already set forth in the prohibitory statutes enacted by a higher legislative authority. Its purpose is not to prohibit such act or acts, but to ascertain that the property for which it is responsible will not knowingly be used in any such manner. For complete definition of what is a crime or act prohibited by law, reference may be made to the individual statutes of prohibition. If any such individual statute is subject to the ligitimate claim of vagueness, the specific act which that statute attempts to prohibit may not be punishable. But a simple reference to all such acts in a statute which is not criminal in nature, is not vague.

"Reasonable certainty is all that is required. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language." (43 Cal.Jur.2d, Statutes, § 37, p. 561, and cases cited in fn. 20.) It will be upheld if its terms may be made reasonably certain by reference to other definable sources. (*Idem*). Here reference to the Penal Code supplies any allegedly missing definition of what is meant by "crime" or by "acts prohibited by law." Even in the case of a penal statute it has been held that the failure to define the word "crime" cannot be attacked as vague or indefinite for the reason that the meaning of such word may be discovered by reference to other code provisions. (*People v. Hyder*, 55 Cal.App. 687, 690 [204 P. 410]).

Petitioners also urge that rule 1310 is arbitrary and too broad, inasmuch as it attempts to include the entire field of criminal law within its scope. As already

pointed out, respondent has a statutory duty to prevent illegal use of its property. Thus the statute cannot be claimed to be arbitrary. If the applicant knowingly intends to use the premises for illegal purposes, the board is entitled to know this in advance, and to prevent, by denying a permit the abuse of the privilege. (See *Times Film* decision, *supra.*) So interpreted the ordinance does not grant uncontrolled discretion to the board.

It is true, as petitioners contend, that enactments "which are over-broad are unconstitutional" (*Katzev v. County of Los Angeles*, 52 Cal.2d 300, 307-308 [341 P.2d 310]). It is also true that a statute which is overly broad in its terms or coverage amounts to denial of due process because it fails to provide a proper definition of the crime intended to be established. Such authorities are not here in point. Here the statute itself does not purport to define a crime, but simply seeks to ascertain that an applicant for the use of public property does not intend to use it for an illegal purpose. As pointed out above, the penal ramifications of this statute are potential only, and can become actual only in conjunction with a charge of perjury, which is adequately defined in another statute. The requirement of the rule here involved is similar to that of many statutes requiring an applicant to give information in advance of receiving a particular privilege or benefit allowed by law to persons who qualify according to a factual standard set forth in the statute. In such situations the applicant is required to file statement (usually under oath) setting forth those facts which bring him within the statute. Frequently such information is required to be given in the same general

form as required herein." Such requirements are not unconstitutional because the statute or rule containing the requirement is not penal in nature. Its purpose is simply to limit the granting of the benefits to those persons qualified under the respective statutes. The requirement that an applicant for the use of school property state that it will not knowingly use the premises for any illegal act is subject to the same interpretation.

The courts have been quite liberal in permitting general phraseology. In *American Communications Assn. v. Douds, supra*, 339 U.S. 382, the United States Supreme Court held that the phrase "illegal and unconstitutional methods" was sufficiently definite to withstand such an attack. That decision dealt with the requirement that union officials, seeking the benefits of federal labor laws for their unions, file a non-communist affidavit. The high court not only held that the quoted language was sufficiently definite to withstand the test of due process, but it further stressed the fact that the only punishment specified in the statute was prescribed for statements made "knowingly and wilfully." Respondent's rule 1310 requires a statement in language similar to that approved in *American Communications*, and it likewise contains the saving clause that such statements be made only "to the best of . . . [declarant's] knowledge."

"For example: Social Security regulations require recipients to state that they are not receiving more than a stated amount of earnings *from any source*; veterans' tax exemption statutes require a sworn statement that claimant does not own any property of a value beyond a stated amount; federal labor laws require officials of unions, which desire to qualify, to state that they are not members of *any organization* advocating subversive doctrines. There are many other examples.

In the final analysis, the determination that a particular statute is or is not too broad in the constitutional sense turns not so much on its language as upon its effect. A statute may be phrased in words that are "broad," in that they convey general rather than specific concepts, and yet be the means of stating a regulation that is narrow and limited in its application. (See for example the two ordinances involved in *Saia v. New York*, 334 U.S. 558 [68 S.Ct. 1148, 92 L.Ed. 1574], and *Kovacs v. Cooper*, 336 U.S. 77 [69 S.Ct. 448, 93 L.Ed. 513, 10 A.L.R.2d 608].) Such is respondent's rule. It is not phrased as a regulation, in that it does not enumerate specific acts which may or may not be performed on school property. It is cast in words of prohibition, in that it effectively prohibits the use of the property if the applicant intends to commit *any* crime on those premises. The fact that it embraces *any* illegal act does not make it too broad, in the constitutional sense. (See *Kovacs v. Cooper*, *supra*.)

Some mention is required of the fact that rule 1316 in addition to the requirement that the applicant state that the premises will not knowingly be used for an illegal purpose, also requires a denial of any intent to commit the crime specified in sections 11400 and 11401 of the Penal Code. Those sections prohibit and penalize advocacy of, or teaching, aiding or abetting criminal syndicalism (which is defined as any act intended to accomplish change in industrial ownership or government by means of unlawful force, violence or terrorism). Admittedly, the inclusion of the one specific in the otherwise general language of the statute is suspect, and petitioners make the most of it. To them

it looks as if respondent intended only to prevent the use of its school buildings for the political crime defined in those two code sections. We cannot indulge in any such assumption. But, even if we do assume, *arguendo*, that such was the purpose of the board, that fact would not affect the propriety of the form in which the statute was enacted. The inclusion of the specific clause is relevant to a claim that rule 131c is broad and arbitrary only if the specific statute thereby included is, of itself, broad or arbitrary. While it is true that certain attempted applications of the radical syndicalism act have been held to be unconstitutional (*Danskin v. San Diego Unified Sch. Dist., supra*, 28 Cal.2d 536), the act itself has been upheld against just such attacks (*In re McDermott*, 180 Cal. 783 [183 P. 437]; *In re Flood*, 194 Cal. 49 [227 P. 908]; *People v. McCleinegen*, 195 Cal. 445 [234 P. 91]; *Whitney v. California*, 274 U.S. 357 [47 S.Ct. 641, 71 L.Ed. 1095]; and many others). Since the general statement that applicant will not commit any crime includes the specific crime defined by sections 11400 and 11401, the inclusion of the latter neither adds nor detracts from the former. The requirement that applicant deny an intent to commit radical syndicalism appears to have been entirely unnecessary, but it makes the respondent's ordinance neither more nor less broad or arbitrary.

Respondent was not barred from further legislation in the field by reason of state preemption:

Petitioners argue that the fact that the provisions of Education Code section 16505 have been held unconstitutional does not remove the state's occupation of the field. The full implication of such argument is that when the state completely occupies a certain field of

legislation, and subsequently a portion thereof is stricken by judicial action, the latter action does not reinstate local power to legislate, since the state has expressed its intent to occupy the entire field.[9] The basic premise of this argument is factually incorrect. Here, the state Legislature not only refrained from expressing an intent fully to occupy the field of regulation of the use of school properties, but it affirmatively empowered the respective school boards to take all necessary steps in providing such regulation. Education Code sections 16551, 16555, 16556, 16558, 16559, 16561, 16562 and 16563 (each of which is within and a part of the Civic Center Act) all contain provisions indicating such an intent. Some are merely permissive, in that they authorize, but do not require the local board to grant public use of property under certain conditions, thus leaving the board to make its own rulings thereon. Some authorize, but do not require, the board to make charges for the use of the property commensurate with the cost to the school district, thus leaving the board to make the necessary regulations in regard thereto. But of chief interest are the provisions of sections 16557 through 16559. Section 16557 provides, in part, that "[t]he use of any public schoolhouse and grounds for any meeting is subject to such reasonable rules and regulations as the governing board of the district prescribes[.]" 16558 declares that the

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[9]This entire issue of preemption is predicated upon the rule which holds section 11 of article XI of the state Constitution to be a limitation on, as well as a delegation of local power to enact regulations within the police power. (See *In re Hinga*, 190 Cal. 769 [214 P. 850]; *Pipoly v. Benson*, 20 Cal. 2d 366 [125 P.2d 482, 147 A.L.R. 515]; *Abbott v. City of Los Angeles*, 53 Cal.2d 674 [3 Cal. Rptr. 158, 349 P.2d 974].)

management, direction and control of the civic center is vested in the board, and 10559 gives the board power to make all needful rules and regulations for conducting civic meetings in such property. The language of these sections, as well as the content of the entire chapter, clearly indicates a legislative intent to provide a statewide method whereby school property may be made available to the public for certain specified purposes, and to leave the details thereof to further legislation by each local school board. Thus the Civic Center Act did not preempt the field. A further indication that the state did not intend to preempt the field is to be found in the very sections (10504 and 10505) held by us to be unconstitutional in our prior opinion. The first of those two sections provided that school property shall not be used to further any program intended to accomplish the overthrow of government by force or violence, and makes such use a misdemeanor. The second provided a statement to be filed with the school board by the applicant, for the purpose of ascertaining that no such illegal use would be made of the property. In addition, that section provided that "[t]he school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of the school property" would not violate the provisions of section 10504. That authorized the local authorities to legislate beyond and in addition to the provisions enacted by the state Legislature. The fact that a portion of the state enactment was found to be unconstitutional on other grounds does not eliminate such clear statement of legislative intent. *Tolman v. Underhill*, 39 Cal.2d 708 [249 P.2d 280], on which petitioners rely (and which struck down as

invalid by reason of state preemption a loyalty oath which the Regents of the University of California sought to impose on its faculty) is not controlling for the reason that there the state Legislature had covered the field of employee loyalty oaths without expressly reserving a further right to local public employers. Petitioners' further citations are not in point, in that they pertain to fields of legislation which, by their peculiar nature, require a single statewise system. Such is not true of the regulation of use of school property which, under the existing state statute, may be made available to the public on such terms as the local boards shall determine.

Rule 1316 of the respondent board is not invalid for any of the reasons suggested by petitioners. The alternative writ of mandate theretofore issued should be discharged and a peremptory writ denied. It is so ordered.

Gibson, C. J., Traynor, J., Schauer, J., McComb, J., Tobriner, J., and Peek, J., concurred.

IN THE

Supreme Court of the United States

October Term, 1963

No. 240

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California corporation, EASON MONROE,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

On Petition for A Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION

HAROLD W. KENNEDY,
County Counsel
and
RONALD L. SCHNEIDER,
Deputy County Counsel
By HAROLD W. KENNEDY,
County Counsel
648 Hall of Administration
Los Angeles, California, 90012
Attorneys for Respondent.

WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1732

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OPINION BELOW

The opinion of the California Supreme Court is reported in 59 Adv. Cal. 215, 28 Cal. Rptr. 709 (Pet. for Writ, Appx. "A").

QUESTION PRESENTED

Whether Board of Education of the City of Los Angeles can require applicants for the use of school property to file a "Statement of Information" as required by its Rule 1316, which reads as follows:

> "1316. Statement of Information. 'Each person or group requesting the use of the premises for a Civic Center Activity shall, as a condition for the issuance of the permit, file the following statement:.
>
> " 'The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime including, but not limited to, the crime specified in Sections 11400 to 11401 of the California Penal Code. I certify (or declare) under penalty of perjury that the foregoing is true and correct.' "

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10557 of the Education Code of the State of California provides:

> "The use of any public schoolhouse and grounds for any meeting is subject to such reasonable rules and regulations as the governing board of the district prescribes and shall in nowise interfere

with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State."

Section 16558 of the Education Code of the State of California provides:

"The management, direction, and control of the civic center is vested in the governing board of the school district."

Section 16559 of the Education Code of the State of California provides:

"The governing board of the school district shall make all needful rules and regulations for conducting the civic meetings and for such recreational activities as are provided for in this chapter (commencing at Section 16551) and which aid, assist, and lend encouragement to the activities."

Rule 1316 of the Los Angeles Board of Education provides:

"1316. Statement of Information. Each person or group requesting the use of the premises for a Civic Center Activity shall, as a condition for the issuance of the permit, file the following statement:

"'The undersigned states that, to the best of his knowledge, the school property for the use of which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime includ-

ing, but not limited to, [illegible] crime specified in Sections 11400 to 11401 of the California Penal Code. I certify (or declare) under penalty of perjury that the foregoing is true and correct.' "

STATEMENT OF THE CASE

Petitioner's Statement of the Case (Pet. for Writ. pp. 5-6) adequately sets forth the factual background of this case.

I.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner's claim that respondent's Rule 1316 is unconstitutional is based on three major premises: that the rule constitutes an unconstitutional abridgement of free speech and assembly; that the rule subverts the presumption of innocence and inverts the burden of proof; and that the rule violates due process due to its alleged vagueness.

In a unanimous decision the Supreme Court of California discussed and refuted point by point each contention. Respondent submits that this decision is correct and does not raise the specter of Federal-State decisional conflict.

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[2] A fourth point raised by Petitioners in the court below that Respondent is barred from further legislation in the field by reason of state preemption, is apparently not being raised here.

a. Rule 1316 constitutes a proper exercise of the authority of a local board of education to determine in advance that proper use will be made of public school facilities. It is not an unconstitutional prior restraint on speech or assembly.

Respondent's Rule 1316 is a result of the authority given it by the state Legislature to prescribe and enforce reasonable regulations regarding the use of school property (See: California Education Code, Secs. 16557, 16558 and 16559). It is submitted that this regulation is eminently reasonable.

On its face or as applied here, Rule 1316 does not concern itself with the content of proposed speech as such.[2] There is no requirement that an applicant for the use of school property submit in advance and for a predetermination of its acceptability, what is to be said or performed on the premises. It does not put into the hands of the school authorities the discretion, unbridled or otherwise, to deny any particular use because of official disapproval of the use or of the applicant himself.

What it does require is that the applicant censor itself; that in advance of use, the applicant assure the authorities that it does not intend to knowingly com-

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[2]This factor completely distinguishes this case from the first A.C.L.U. case *American Civil Liberties Union v. Board of Education*, 55 Cal. 2d 167, cert. denied 368 U.S. 819, relied on by Petitioners in the court below. In that case a California statute which denied the use of school facilities to applicants based solely on criteria involving the applicant's political beliefs was held unconstitutional.

mit any criminal act on school property. Surely this requirement is within the ambit of authority of school officials.

In determining that Rule 1316 was not an unconstitutional prior restraint on speech and assembly, the California Supreme Court relied heavily on this court's recent decision in *Times Film Corp. v. Chicago*, 365 U.S. 43 holding that it was not an unconstitutional abridgement of free speech to require that an exhibitor submit a motion picture film for review prior to public exhibition.[3]

Far from being out of harmony with that recent decision, Respondent's Rule does not even go as far as does that case. For the effect of *Times* is to subject to prior review the actual contents of particular speech to be employed in the future, with the attendant hazards of potential arbitrariness and unreasonableness in application. Here no review or prior disclosure of the contents of speech is required.

The court below pointed out in some circumstances the exercise of free speech is not unfettered.

> "There is a great difference between the exercise of those fundamental rights which do not require prior permit and those which, while they

[3] It is interesting to note that despite the heavy reliance on this case by the court below, not once do Petitioners discuss its applicability or even cite the case to the attention of this court.

may not be denied arbitrarily, require permit or licensing by a public authority." (Pet. for Writ, Ex. "A," p. 8)

Thus Petitioners are confused when they equate First Amendment problems that would be present if Respondent was to require disclosure of connections and affiliations of applicants as a condition of use, (See: Pet. for Writ, f.n. 2 and p. 11) with the situation here presented. For Respondent has requested no examination of the content of speech, exhibited no interest in applicant's qualifications, beliefs or past activities, but merely evidenced a determination to require that its property will be used in a lawful manner.

The California Supreme Court properly held that public school authorities had the right to place reasonable restrictions on the right of assembly in school buildings based solely on use and that Rule 1316 was a proper tool to use in applying such limitations.

b. Rule 1316 neither subverts the presumption of innocence nor inverts the burden of proof.

Petitioners declare that the Rule declares every applicant "presumptively guilty of crime." (Pet. for Writ, p. 14) Not so. Since the Rule is aimed at future conduct, it is totally unrelated to the issue of guilt or innocence of crime. Similarly, since only the applicant's own statement, taken at face value, is requested prior to usage, no further or ultimate burden of proof

is required. Thus the vice of a statutory scheme requiring the carrying forward of the burden of a series of proofs of innocence struck down in *Speiser v. Randall*, 357 U.S. 513, is eliminated. (cf. *Konigsberg v. State Bar of California*, 366 U.S. 36 where a requirement that California State Bar applicants establish a prima facie case of non-advocacy of violent overthrow of government was held proper).

c. Rule 1316 is not vague.

The California Supreme Court thoroughly analyzed the language used in Rule 1316 as well as its effect and determined that the rule's general phraseology with its one specific statutory reference, were within constitutional limitations. Since the Rule is not criminal in nature but rather informative in effect, reasonable certainty in language is all that is required. That certainty is present here since persons are referred to the California Penal Code for particular definitions of what is meant by the words "crime" or "acts prohibited by law."

II.

THE DECISION BELOW IS CLEARLY CORRECT SINCE RULE 1316 IS NOT DESIGNED TO CURB SPEECH.

Despite Petitioners' claims (Pet. for Writ, p. 8) Rule 1316 is not aimed at political advocacy, or for that matter, advocacy of any kind. Here is a regulatory tool which requires no information regarding the applicant himself, requires no disavowal of political belief or membership in any named political party, and requires no associational disclosures. The Rule does not name or by implication identify any group or individuals and bar the doors to such without regard to the lawful or unlawful purpose of the proposed use. In its application, Rule 1316 bars the doors only to those who cannot or will not agree in effect to use school property for lawful purposes. Surely it could not be disputed that separate and itemized limitations upon illegal use would be proper. It is submitted that a single general request made of those who wish to use public property that the proposed use be legal is equally valid.

CONCLUSION

It is submitted that Rule 1316 is a proper exercise of authority by school officials to reasonably control the use to be made of school property. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel
and
RONALD E. SCHNEIDER,
Deputy County Counsel

By HAROLD W. KENNEDY,
County Counsel
648 Hall of Administration
Los Angeles, California, 90012
Attorneys for Respondent.

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IN THE

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OCTOBER TERM, 1962
No. 240

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California corporation, and EASON MONROE,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

Brief of Amicus Curiae in Support of Petition for Writ of Certiorari to Supreme Court of the State of California.

RICHARD H. FLOUM,
9720 Wilshire Boulevard,
Beverly Hills, California,
Attorney for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Brief of Amicus Curiae in Support of Petition for Writ of Certiorari to Supreme Court of the State of California.

I.

Interest of Amicus Curiae.

This Brief of Amicus Curiae is filed pursuant to Rule 42 of the revised rules of this honorable Court and in accordance with the written consent of all parties to this case attached to the original of this Brief as Exhibit "A".

The American Jewish Congress is vitally concerned with and affected by the availability of forums at which persons of every persuasion and political belief, be they Communists, American Nazis, John Birchers,

World Federalists; Black Muslims or Vegetarians, are able to express their views and opinions and hear such views and opinions challenged, reported and tempered in the free market place of ideas. It believes that the rule of the Los Angeles Board of Education here involved strikes a significant and unconstitutional blow against the availability of such forums and, if permitted to stand, will lead to the proliferation of such rules, ordinances and laws, with the inevitable result of further limiting and restricting the promulgation of the hetorodox, the provocative and the revolutionary ideas on which our nation was founded and grew to greatness. In sum, the issues presented by this case are of great moment and vitally affect the interests of this amicus and all other Americans who agree that not only must speech be left free and untrammeled but that forums must remain available for the free and unfettered dissemination of such speech.

II.

Facts.

Petitioner ACLU is one of the leading libertarian organizations in this Nation whose members, coming from all walks of life and from all political persuasion, are bound together by an abiding faith in our democratic heritage and institutions. It applied for a permit to use the auditorium of the John Burroughs Junior High School in Los Angeles for a series of public bi-monthly meetings on the subject of the "Bill of Rights". Its application was denied solely because it

refused to comply with Los Angeles Board of Education Rule 1316 which requires every person or group requesting the use of school premises made available to the public under the California Civic Center Act (Ch. 4, Div. 12, Cal. Ed. Code, Section 16551 *et seq.*) to sign an oath under penalty of perjury that "to the best of his knowledge, the school property for the use of which application is hereby made will not be used for the commission of any act which is prohibited by law or for the commission of any crime, including, but not limited to, the crimes specified in Sections 11400 to 11401 of the California Penal Code" (the California Criminal Syndicalist Act). As adopted, the California Civic Center Act which makes available school auditoriums for public meetings provided in part as follows:

> "*Creation of civic centers and authorization of use of other properties.* There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Gov-

> erning boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities. (Cal. Ed. Code, Section 16556)."

The draftors of this Act attempted to exclude from its purview any group or persons affiliated with a group which has "as one of its objects . . . the overthrow or advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means". The Act as originally drafted further provided that the local school board could require an affidavit showing that the applicant was not a member of or such a proscribed organization. However, the Supreme Court of California in *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885 (1946) held such limitation on the usage of a civic center violated the First Amendment of the U. S. Constitution. That court, relying upon this Court's opinion in *DeJonge v. Oregon*, 299 U. S. 353 (1937), held that while the State had no duty to make available school premises for public assembly and speech, once it had done so it could not unconstitutionally prevent certain members of the public from using such premises for lawful means. The California Supreme Court, relying upon *DeJonge* held

> "if it is unconstitutional for the State to prohibit certain persons or groups classified as 'subversive elements' from exercising their rights in

free speech and assembly at places where others are allowed to speak and assemble, it is a *fortiori* unconstitutional to require proof from any persons or groups that they are not a subversive element." (28 Cal. 2d at 548).

After the *Danskin* decision, the Civic Center Act was amended to provide in Section 16564 thereof that any use of a civic center by a person or group "for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States or of the State by force, violence or other unlawful means shall not be permitted or suffered".

And Section 16565 was also amended to require the applicant to sign a statement under penalty of perjury that to the best of his knowledge (1) "the school property [applied for] will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States by force, violence or other unlawful means; (2) that "the organization on whose behalf he is making application . . . does not . . . advocate the overthrow of the government of the United States or of the State of California by force, violence, or other unlawful means, and . . . is not a Communist-action organization or Communist-front organization . . .". The Supreme Court of the State of Cali-

fornia in *A.C.L.U. v. Board of Education of the City of Los Angeles*, 55 Cal. 2d 167, 359 P. 2d 45 (1961) declared these sections of the Civic Center Act unconstitutional under the First Amendment of the Federal Constitution as constituting an unlawful prior restraint on speech and assembly. The Court reasoned that the oath required

> "amounts to a censorship in advance of the right of assembly and free speech upon the mere determination of the probability of its future misuse. Prior censorship upon such a prophetic finding can certainly only be justified, if at all, upon the clearest sort of showing that such misuse will with reasonable certainty occur." (55 Cal. 2d at 179).

The court then went on to hold that no such showing was made in this case nor could be implied from the mere failure of the A.C.L.U. to sign the oath in question.

This, then, is the historical setting in which the Los Angeles Board of Education adopted Rule 1316. As clearly demonstrated both by the minutes of said Board of Education dated April 6, 1961 and the specific incorporation of the California Criminal Syndicalist Act, the clear and explicit purpose of Rule 1316 was to do by indirection what the State of California by direction on two prior occasions was constitutionally prevented from doing: restrict the use of civic centers and forbid their use by Communists, Communist-front and Communist-action organizations.

III.

Argument.

Rule 1316 of the Los Angeles School Board on Its Face and as Applied to Petitioners Constitutes an Unconstitutional Prior Restraint on Free Speech and Assembly and Is Therefore Violative of the First Amendment to the Constitution to the United States.

With this history in mind, we turn to the basic contention of amicus herein which is: That the oath in question both on its face and as applied to petitioners constitutes an unlawful prior restraint on free speech and assembly.*

That the oath in question constitutes a prior restraint on speech and assembly cannot be gainsaid. This Court on numerous occasions has held or declared that any oath, restriction or license which constitutes a condition precedent to speaking or assembling constitutes a prior restraint on such speech and assembly.

See *e.g.*, *N.A.A.C.P. v. Alabama*, 357 U. S. 449 (1958). (Order to compel disclosure of names and addresses of all Alabama members unconstitutional restraint on freedom of speech and association.)

Grosjean v. American Press Co., 297 U. S. 233 at 244-245 (1936). (State law imposing license tax on gross receipts of advertising revenues of newspapers of over 20,000 per week circulation unlawful prior restraint on freedom of press since "direct tendency is to restrict circulation".)

Hague v. C.I.O., 307 U. S. 496 at 516 (1939). (Municipal ordinance requiring permit for assembling

*Amicus agrees with the other points raised by Petitioners in their petition for certiorari, but believe that no additional argument or points and authorities are necessary in support thereof.

on public streets which could be refused by issuing authority upon belief that would prevent "riot, disturbance, or disorderly assemblage", held void on its face.)

Schneider v. Irvington, 308 U. S. 147 at 163-164 (1939). (Municipal ordinance requiring permit to, *inter alia*, distribute circulars which might be refused on ground applicant not of good character or canvassing for project not free from fraud unconstitutional prior restraint when applied to noncommercial canvassing by one who distributes booklets published by a religious organization.)

Cantwell v. Connecticut, 310 U. S. 296 at 305 (1940) (State statute prohibiting any person from soliciting money for alleged religious or charitable organization without first obtaining certificate from public officer determining its bona fides, *inter alia*, unconstitutional prior restraint when applied to Jehovah's Witness sect.)

Thomas v. Collins, 323 U. S. 516 (1945). (State statute requiring labor organizers to register with state official before soliciting members unconstitutional prior restraint of speech and assembly.)

Saia v. New York, 334 U. S. 558 (1948). (Municipal ordinance prohibiting use of amplifying devices on public streets without permit constituted unlawful prior restraint on speech.)

Kunz v. New York, 340 U. S. 290 (1951). (City ordinance requiring permit to hold religious meeting upon the streets unconstitutional on its face as a prior restraint on speech.)

Staub v. Baxley, 355 U. S. 313 (1958). (Municipal ordinance requiring persons who solicit member-

ship in any organization requiring payment of dues void on its face as unconstitutional prior restraint on speech.)

See also Emerson, *Doctrine of Prior Restraint*, 20 Law and Contemp. Prob. 648 (1955).

The teaching of the above cited cases has been correctly summarized by Emerson, *supra*, as standing for the proposition that prior restraint includes "legislative restraints which make unlawful public or other communication unless there has been previous compliance with specific conditions imposed by legislative act." (*id.* at 650).

Indeed, the Supreme Court of California itself recognizes that the oath in question does constitute a prior restraint on speech and assembly. Thus, the Court admits: "In a very limited sense, the requirement that one state in advance that he will not knowingly commit an illegal act constitutes a prior restraint. . . ." (50 A. C. at 223). See also, *American Civil Liberties Union v. Board of Education*, 55 Cal. 2d 167 at 178, 359 P. 2d 45.

Having established that Rule 1310 constitutes a prior restraint on speech and assembly, amicus turns now to a demonstration that such prior restraint was unconstitutional.

While it is true that a prior restraint on speech or assembly is not *ipso facto* unconstitutional, only in the most exceptional of cases can such prior restraint be upheld. Thus, in the landmark and still leading case on the subject, *Near v. Minnesota*, 283 U. S. 697 (1931) this Court struck as an unconstitutional prior restraint on speech the application of a Minnesota statute permitting the restraining of publication of

"malicious, scandalous and defamatory newspapers" to the publication of a newspaper whose nine previous issues had been admittedly libelous, scurrilous and anti-semetic. In an opinion by Chief Justice Hughes, the Court declared:

> "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is not absolutely unlimited. But the limitations has been recognized only in exceptional cases."

and held the case before it was not such an exceptiona case. And in *Burstyn v. Wilson*, 343 U. S. 495 at 504 (1952) this Court, in striking down a state statute banning the exhibition of sacrilegious motion pictures, declared:

> "This court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' Id. 283 U. S. at 716, 75 L. ed. 1367, 51 S. Ct. 625. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case."

And in the most recent restatement and application of the prior restraint doctrine of which amicus is aware, Judge Breitel in the case of *Rockwell v. Morris*, 211 N. Y. S. 2d 25 (Sup. Ct. App. Div.) *aff'd per curiam*, 176 N. E. 2d 830 (N. Y. Ct. App.), *cert. denied*, 368 U. S. 913 (1961) reversed the lower court's upholding the refusal of the New York City Park Commissioner to grant a permit to George Lincoln Rockwell, the self-styled leader of the American Nazi party to speak in a public park, declaring:

> "There is no power in government under our Constitution to exercise prior restraint of the expression of views, unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal—not that such expression, without itself being unlawful, will incite criminal acts in others."

Nor does the disputable decision of this Court in *Times Film Corp. v. Chicago*, 365 U. S. 43 (1961) weaken the above authority since there the five-membered majority was faced with and ruled upon a broadside attack which sought to have an admitted prior restraint declared unconstitutional in *every case*. The majority was careful to limit its decision simply to reaffirming the fact that prior restraints *as applied to the movie industry* are not *ipso facto*, unconstitutional. While amicus is not prepared to concede that *Times Film* was properly decided, it in no way (as the California Supreme Court erroneously thought) decides the instant case, since here we deal with a concrete situation: an application by the A.C.L.U. to use a civic center for public meetings on the Bill of Rights. As such, Rule 1316 clearly constitutes an

unconstitutional prior restraint on speech and assembly under the First Amendment of the U. S. Constitution, as applied to the States and their political subdivisions under the 14th Amendment. See *e.g., Schneider v. Irvington, supra; Cantwell v. Connecticut, supra.*

Amicus also believes that Rule 1316 is invalid on its face since it obviously proscribes speech and assembly in situations not limited to the exceptional cases articulated in the *Near* case in which a prior restraint may be justified. *Grosjean v. American Press Co., Saia v. New York, Kunz v. New York, Staub v. Baxley, supra.*

Conclusion.

Amicus submits that on the basis of the foregoing authorities of this court, the Los Angeles Board of Education rule in question infringes the First Amendment of the United States Constitution and that this type of invidious and unconstitutional rule should not be left standing by this honorable court who should grant the petition for certiorari on file herein in order to state once more, as it has stated in so many cases in the past, that unconstitutional prior restraints on freedom of speech and assembly shall not be sanctioned.

The type of oath before the court is one that obviously will not prevent someone who in fact wishes to use school property for illegal purposes from proceeding with his plan. On the other hand, members of certain religious faiths such as the Quakers and Jehovah's Witnesses and members of certain liberal organizations such as the A.C.L.U., as well as numerous other people and organizations who hold strong ideals respecting freedom of speech and rights of privacy, will be prevented by their conscience and by this illegal

rule from stating their views to the public. Thus this oath, like the oath formerly required under the National Defense Education Act, will have the same invidious effect as expressed by President (then Senator) Kennedy in the Hearings before the Sub-Committee on Education on S.819 to amend the loyalty provisions of the National Defense Education Act of 1958.

Mr. Kennedy stated there:

> "The sole justification for this requirement seems to be that it might prevent a card-carrying member of the Communist Party from benefiting from a loan for educational purposes made by the school and the Federal Government. I would doubt, however, that any member of a truly subversive organization would have the slightest hesitancy in perjuring himself. This provision does not keep such persons out of the program. *But it may well eliminate those who resent the requirement, those who find it inconsistent with their ideals*, those who are overapprehensive in their interpretation, those who are *conscientiously opposed to test oaths, those who believe that there should be no restriction upon freedom of thought and freedom of belief*. And those who are willing to sign such an affidait are not always by that act necessarily proven to be more loyal or more talented than those who do not sign." (Emphasis supplied.)

Respectfully submitted.

RICHARD H. FLOUM,
Attorney for Amicus Curiae.

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BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

A. Respondent acknowledges that Rule 1310 is a censorship provision, but seeks to justify it on the ground that only self-censorship is involved. Thus respondent says (p. 6) "What it (the Regulation) does require is that the applicant censor itself."

If an evil worse than imposed censorship can be conceived, it is the evil of self-censorship. This Court has so ruled in *Smith v. California*, 361 U. S. 147, 154: "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."

Self-censorship is as offensive here as it was in *Smith*. There, the bookseller would not stock the books and the public could not read; here, the speaker will not speak his mind and the public could not hear.[1]

Respondent further acknowledges, as did the court below, that the regulation challenged here is in that category of governmental action which involves (Resp. Br. 8) "'permit or licensing by a public authority,'" relying upon *Times Film Corporation v. Chicago*, 365 U. S. 43. That case did, in the special context there presented,[2] permit a prior censorship. But we do not consider that case applicable here (see footnote 2, *supra*). If the Court should consider *Times Film* apposite, then, we submit, the Court should reconsider the case and overrule it. However, because of the vast difference between *Times Film* and the instant case, we do not believe that to be necessary.

Respondent has, as we have shown, recognized that the Regulation sets up a system of prior censorship. But this Court has just noted that "'(a)ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity'" (*Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70, citing *Near v. Minnesota*, 283 U. S. 697 and other classic cases.)

How has respondent carried this heavy burden in its memorandum in opposition to certiorari? It has pref-

[1] This Court re-affirmed *Smith* only last term in *Bantam Books v. Sullivan*, 372 U. S. 58, in dealing with a comparable problem involving a "system of informal censorship" (p. 71).

[2] "At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record" (365 U. S. at 50).

fered no denial to petitioners' sweeping assertion[3] as to the absence of any danger warranting the requirement. Indeed, no other Board of Education in the entire State of California, with the exception of San Diego (see *ACLU v. Board of Education*, 59 A. C. 236, 379 P. 2d 16, 28 Cal. Rptr. 712), out of the One Thousand Six Hundred and Forty boards of education in the State,[4] has seen the need for, nor adopted, any oath or similar requirement; nor has the state legislature nor the people of California by popular vote (see Petition, bottom page 10). This scarcely suggests, and certainly respondent has not shown, any clear and present danger, nor any compelling subordinating State interest which justifies respondent's sweeping imposition of self-censorship.

B. It is not true, as urged by respondent (Br. 6, 10), that the Regulation "does not concern itself with the content of proposed speech" or with a "pre-determination of (the) acceptibility (of) what is to be said" or with "advocacy of any kind." Indeed we are unable to understand respondent's assertion (Br. 10) that "Rule 1316 is not aimed at . . . advocacy of any kind." Virtually the entire California Criminal Syndicalism Act (Penal Code 11400-11401) is concerned with advoca-

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[3] Petition pages 9-10:

> "Neither respondent, nor its counsel, nor the court below made any findings nor even any claim, and certainly no showing, that there was any, or a danger of any, advocacy of Criminal Syndicalism at all, much less in a public meeting held in a civic center dedicated to free speech. Nor was there any finding, claim or showing to justify the oath, that the all inclusive, 'any act which is prohibited by law or . . . any crime' was occurring at such public meetings."

[4] Letter of July 26, 1963 from Henry W. Magnuson, Chief, Bureau of Education Research, State of California, Department of Education to the writers of this brief.

cy.[5] Should one desire to discuss Criminal Syndicalism, as a political philosophy or otherwise, respondent Board passes on the question and makes a pre-determination, in advance, as to the nature and import of that doctrine.

C. Respondent is of the view (Br. 8) that since the Regulation "is aimed at future conduct", that makes everything all right. But in the nature of things, and one of its chief vices is that, the test oath applies to future conduct. (See *Speiser v. Randall*, 357 U. S. 513; *Re Summers*, 325 U. S. 561; dissenting opinion; *Girouard v. United States*, 328 U. S. 61; *cf.* Chief Justice Hughes, dissenting, in *United States v. Macintosh*, 283 U. S. 605). It is precisely to such oaths as to the future, that persons of conscience balk (*ibid.*).

Konigsberg v. State Bar of California, 366 U. S. 36, cited by respondent (Br. 9), is not apposite here. Not involved here is a privilege which requires of the applicant good moral character and the high regard and confidence of the public as was the case in *Konigsberg*. It is one thing to say that one may not be a lawyer without qualifying therefor. And in order to qualify, it may be proper to require of him the burden of showing, *prima facie*, that he does qualify. But one need not "qualify" in order to be entitled to the First Amendment rights of speech and assembly. Under our Constitution, a citizen has those "unalienable" rights without more.

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[5] *E.g.* Penal Code §11401 speaks of "spoken or written words", "advocates", "teaches", "justifies", "attempts to justify", "prints", "publishes", "edits", "issues", "circulates", "publicly displays", "books", "papers", "pamphlet", "document", "poster", "written or printed matter in any form", "containing or carrying written or printed advocacy, teaching", "advising", etc.

D. Respondent is quite in error in its statement (Br. 9) that under Rule 1310, the applicants "are referred to the California Penal Code for particular definitions of what is meant by the words 'crime' or 'acts prohibited by law.'" The very fact that skilled and competent counsel for respondent should consider that only the Penal Code is involved is dramatic demonstration of the vagueness of the regulation. In California, "crimes" are set forth in numerous codes other than the Penal Code,[6] as well as in its Constitution.[7]

Moreover, in California "acts prohibited by law" encompass not only codified situations,[8] but also those embodied in the decisions of the courts.[9]

Furthermore, the Regulation in question here is not limited to California crimes,[10] but includes "any act which is prohibited by law" and "any crime" which encompasses federal offenses as well, both those found

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[6]*E.g.*, Agriculture Code 1066.1, 1273; Business & Professions Code 600, 601; Civil Code 607f, 1858; Code of Civil Procedure 1208.69; Corporations Code 3020, 26104, 35302; Education Code 914, 28801, 28802, 23001; Financial Code 971, 1411; Fish and Game Code, 2011, 1059; Health and Safety Code 11500 *et seq.*; Health and Safety Code 12352; Government Code 15619, 9034; Harbors and Navigation Code 570, 571; Insurance Code 383, 833; Labor Code 971, 973, 974; Military & Veterans Code 648, 421; Probate Code 1155; Public Resources Code 2250, 2274; Public Utilities Code 583, 827; Revenue & Taxation Code 3441, 14774; Streets & Highways Code 27174.2, 27174.3; Unemployment Insurance Code 2102, 2111; Vehicle Code 23110, 10851; Water Code 6420, 21195; Welfare & Institutions Code 118, 7070. Needless to say, this sampling is not, nor is it intended to be, exhaustive.

[7]*E.g.*, Art. I, § 20; Art. IV, § 35, California Constitution.

[8]*E.g.*, Calif. Civil Code § 51, § 69.

[9]Calif. Civil Code § 1899.

[10]Even assuming, as respondent erroneously does, that Rule 1310 refers only to crimes and only to those crimes set forth in "the California Penal Code."

in Title 18 of the United States Code and those scattered throughout the rest of the federal statutes.[11]

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Attorneys for Petitioners.

[11]We have not counted the number of California and federal crimes, and acts prohibited by California and federal law there may be, but we assume they run into the thousands, none of which is defined.